

BAKER BOTTS L.L.P.

Jonathan A. Shapiro (Cal. Bar No. 257199)

jonathan.shapiro@bakerbotts.com

Stuart C. Plunkett (Cal. Bar No. 187971)

stuart.plunkett@bakerbotts.com

Ariel D. House (Cal. Bar No. 280477)

ariel.house@bakerbotts.com

101 California Street, Suite 3600

San Francisco, California 94111

Telephone: (415) 291-6200

Facsimile: (415) 291-6300

Attorneys for Defendants

UNION SQUARE HOSPITALITY

GROUP, LLC, DANIEL MEYER,

and SABATO SAGARIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

TIMOTHY BROWN,

Plaintiff,

v.

140 NM LLC, *et al.*,

Defendants.

) CASE NO. 4:17-CV-05782-JSW

)

) **DEFENDANT DEFENDANTS UNION**

) **SQUARE HOSPITALITY GROUP, LLC,**

) **DANIEL MEYER, SABATO SAGARIA,**

) **MARLOW, INC., ANDREW TARLOW,**

) **MOLINERO LLC, dba HUERTAS, JONAH**

) **MILLER, NATE ADLER, NEW YORK CITY**

) **HOSPITALITY ALLIANCE, INC., AND**

) **ANDREW RIGIE'S REPLY IN SUPPORT OF**

) **MOTION TO DISMISS FIRST AMENDED**

) **COMPLAINT PURSUANT TO FED. R. CIV. P.**

) **12(b)(2)**

)

) Date: June 1, 2018

) Time: 9:00 a.m.

) Courtroom: 5

) Judge: Hon. Jeffrey S. White

)

) Action Filed: October 6, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff has no answer to the moving New York Defendants’ Motion to Dismiss for lack of personal jurisdiction. The Opposition does not even try to address any of the 29 cases cited by Defendants, starting with the five recent Supreme Court precedent that bar Plaintiff’s attempt to sue these out-of-staters in California. Nor is there any reason to believe that, after two failed attempts and full notice of jurisdictional arguments and authorities, Plaintiff could ever satisfy the Fourteenth Amendment. Instead, the Opposition retypes the same inadequate “facts” and “information and belief” from the original complaint and the First Amended Complaint (as if redundancy cured inadequacy), relies on allegations that are not in the FAC (which is not fair advocacy, and here would not make a difference anyway), and proposes an alternative—but discredited—“road” to jurisdiction under a uniquely “lenient” standard. Ultimately, Plaintiff reaches for “jurisdictional discovery” to find the California connections the law required him to have *before* coming to federal court.

First, there is a reason why Plaintiff does not address *any* of the precedent cited by the New York Defendants—literally opposing the Motion to Dismiss without addressing the law upon which it is based. The Supreme Court has spent the last several years reversing courts (and in particular, those within the Ninth Circuit) for the exercise of “loose and spurious” personal jurisdiction that violates out-of-state defendants’ rights under the Fourteenth Amendment.¹ That Plaintiff himself is from Minnesota, who has come to California to sue New Yorkers on behalf of a purported national class, is precisely the sort of red flag raised, and lowered, last year by the Supreme Court in *Bristol Myers*.

Second, the Opposition cannot avoid dismissal with chronic repetition of allegations that, as a matter of law, cannot amount to personal jurisdiction. Plaintiff, for example, cannot explain

¹ See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

1 how miscellaneous Twitter posts are any different than the “internet postings floating in the
 2 ether” that cannot support jurisdiction in California. *See McGibney v. Retzlaff*, No. 14-CV-
 3 01059-BLF, 2015 WL 3807671, at *4 (N.D. Cal. June 18, 2015). Plaintiff again emphasizes that
 4 some New York Defendants “travelled to California one [sic] two separate occasions” (industry
 5 conferences in 2015 and 2016), and that a since-dismissed California defendant made the
 6 opposite trip (once visiting New York City for a “USHG town hall”). (Plaintiff’s Opposition,
 7 Dkt. 157 (“Opp.”) at 14.) Plaintiff does not explain how two visits to California, and one trip
 8 back east, are any better than the “random, fortuitous, or attenuated” contacts that never justify
 9 personal jurisdiction. *Walden*, 134 S. Ct. at 1123 (quoting *Burger King Corp. v. Rudzewicz*, 471
 10 U.S. 462, 475 (1985)). Plaintiff certainly has not pleaded jurisdiction by referring in the
 11 Opposition to facts that are not even in the FAC—such as Mr. Meyer’s never-alleged “hands-on
 12 assistance” to non-party “food outlets in this state” (*see* Opp. at 16, n. 6), at no time in particular,
 13 and with no relationship to Hospitality Included or anything else about this case.

14 **Third**, Plaintiff cannot pave an “alternative road” to personal jurisdiction with a dead-end
 15 “conspiracy theory.” (Opp. at 21–22.) Plaintiff concedes his theory has never been held “viable
 16 and available” in the Ninth Circuit (*id.* at 22), which is a generous way to describe an argument
 17 that has been rejected and even deemed “frivolous.” *See Kipperman v. McCone*, 422 F. Supp.
 18 860, 873 n.14 (N.D. Cal. 1976). All roads must traverse the Fourteenth Amendment, which is
 19 why modern precedent will not tolerate “a more lenient theory . . . with respect to an alleged
 20 conspiracy.” *Compare* Opp. at 9 with *Bristol-Myers*, 137 S. Ct. at 1781 (warning of the “danger
 21 of the California approach”).²

22 **Finally**, jurisdictional discovery is not the answer. Plaintiff has twice failed to meet his
 23 affirmative burden to plead a basis for this Court to exercise personal jurisdiction over *every*
 24 New York Defendant. (*See* Motion to Dismiss Pursuant to Rule 12(b)(2), Dkt. 144 (“Motion”),
 25

26 ² For the same reason, there is no jurisdictional exception for what the Opposition refers to
 27 as the “distance court problem.” (Opp. at 15.) As often happens, Plaintiff seeks to bring a single
 28 lawsuit against a large and geographically diverse group of defendants, but cannot find a single
 court with jurisdiction over everyone. That inconvenient reality cannot displace a Fourteenth
 Amendment that protects defendants. (*See infra* at 4–14.)

at 7.) Plaintiff cannot now keep the New York Defendants in this case with trust me assurances that counsel are “relatively certain” evidence may exist, and/or that the missing allegations “are plausibly available,” culminating in a generic plea for “jurisdictional discovery to secure those facts.” (Opp. at 1, 9.) That is backwards. The law is clear that Plaintiff must establish a “colorable basis” for exercising jurisdiction over each defendant *before* asking the Court to exercise its discretion for jurisdictional discovery (and for this reason, appellate courts consistently decline to second-guess trial courts for denying such unfounded requests for discovery in search of jurisdiction).

II. SUMMARY OF ARGUMENT

The Opposition only confirms that Plaintiff’s FAC should be dismissed without leave to amend. Plaintiff concedes that he has twice failed to plead *any* facts that would enable this Court to exercise specific personal jurisdiction over *five* of the moving New York Defendants, an admission which justifies their immediate, and permanent, dismissal from this case. Nonetheless, Plaintiff charges forward with an Opposition that raises just three arguments in support of his effort to evade dismissal, none of which has any merit.

First, Plaintiff argues that the Court may exercise specific jurisdiction over some of the New York Defendants, based on a diluted version of the *Calder* effects test. Plaintiff is unable, however, to point to allegations in the FAC which demonstrate that any of those defendants committed an intentional act expressly aimed at California, which then caused harm in this state. Instead, Plaintiff contends that some of the Defendants were involved in hosting a town hall in New York, posting on Twitter (to public at large), creating a logo (which is also available to the public at large), and travelling to California on just two occasions, none of which suffice to establish personal jurisdiction. *See HK China Grp., Inc. v. Beijing United Auto. & Motorcycle Mfg. Corp.*, 417 F. App’x 664, 666 (9th Cir. 2011); *Headspace Int’l, LLC v. New Gen Agric. Servs., LLC*, No. CV-16-3917-RGK (GJSx), 2016 WL 9275781, at *4 (C.D. Cal. Nov. 15, 2016).

Second, Plaintiff encourages this Court to travel down an “alternative road” to find personal jurisdiction based on a “more lenient” standard that Plaintiff contends should apply where the complaint attempts to allege a conspiracy. The Ninth Circuit and other California

1 courts have rejected this discredited theory, and other district courts have refused to apply this
 2 theory in the antitrust context. *See Chirila v. Conforte*, 47 Fed. Appx. 838 (9th Cir. 2002); *U.S.*
 3 *Vestor, LLC v. Biodata Info. Tech. AG*, 290 F. Supp. 2d 1057, 1065 (N.D. Cal. 2003); *In re*
 4 *Dental Supplies Antitrust Litig.*, No. 16-CIV-696 (BMC)(GRB), 2017 WL 4217115 (E.D.N.Y.
 5 Sept. 20, 2017). Plaintiff ignores these authorities, and instead cites to outdated and out-of-
 6 circuit case that has since been overruled. Even if conspiracy jurisdiction could apply, Plaintiff's
 7 attempt to invoke it would fail, because the allegations in the FAC do not establish the existence
 8 of an unlawful conspiracy. *See Uhr v. Responsible Hosp. Inst., Inc.*, No. 10-CV-4945 PJS/TNL,
 9 2011 WL 4091866, at *10 (D. Minn. Sept. 14, 2011), *aff'd*, 473 F. App'x 517 (8th Cir. 2012).

10 **Finally**, Plaintiff asks the Court to allow him to conduct jurisdictional discovery to locate
 11 the facts that he is required to have **before** suing defendants in federal court. *Phillips v.*
 12 *Hernandez*, No. 12-CV-748-MMA (WMC), 2012 WL 5185848, at *7 (S.D. Cal. Oct. 18, 2012).
 13 The Court should not subject the New York Defendants to the burden and expense of such a
 14 fishing expedition, based on nothing more than Plaintiff's "purely speculative allegations of
 15 attenuated jurisdictional contacts." *Videx, Inc. v. Micro Enhanced Tech., Inc.*, 6:12-CV-0065-
 16 AA, 2012 WL 1597380, at *2 (D. Or. May 4, 2012).

17 The FAC should be dismissed without leave to amend.

18 **III. ARGUMENT**

19 **A. The Court May Not Exercise Specific Jurisdiction Over the New York** 20 **Defendants Based on the *Calder* Effects Test.**

21 Plaintiff ignores the recent Supreme Court precedent cited by the New York Defendants,
 22 and instead argues that some of them are subject to specific personal jurisdiction under a diluted
 23 version of the *Calder* effects test. (Opp. at 13 (citing *Calder v. Jones*, 465 U.S. 783 (1984))).
 24 The *Calder* effects test goes to the first prong of the three-part test to determine whether a party
 25 has sufficient minimum contacts to be subject to specific jurisdiction.³ Under the *Calder* effects
 26 test, purposeful direction is found where the defendant "1) committed an intentional act, (2)
 27 *expressly aimed at the forum state*, (3) causing harm that the defendant knows is likely to be

28 ³ The three-part test is set forth in the Motion at 8.

suffered in the forum state.” *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (emphasis added).

Plaintiff’s attempt to invoke personal jurisdiction over some of the New York Defendants under the *Calder* effects test fails for a number of reasons, as explained below.

The USHG Defendants. The Opposition spotlights the superficiality of the FAC. Once again, Plaintiff posits that Mr. Sagaria’s two visits to California suffice for personal jurisdiction as “intentional acts expressly aimed at the California urban restaurant market.” (Opp. at 14.) USHG did not “commit an intentional act . . . expressly aimed at California” by hosting a town hall in New York, even if one attendee was a former defendant who flew in from California. (*Id.*) Additionally, Plaintiff contends that Mr. Meyer and USHG established a “help-line,” to provide information about the Hospitality Included model, which presumably is available to anyone with a telephone, even though neither he nor USHG are alleged to operate a restaurant in California with the Hospitality Included model or a tipping model. (*Id.*) Finally, Plaintiff alleges that Mr. Meyer and USHG “supported, expressed encouragement to, and shared information with” the alleged California co-conspirators by, among other things, using Twitter posts to thank Defendant Camino for “leading the way,” and stating that USHG was honored to “share in the dialogue” and learn from West Coast restaurants. (*Id.*)

These allegations come nowhere close to establishing specific personal jurisdiction over the USHG Defendants. Courts have repeatedly dismissed allegations that are based on such tenuous contacts with the forum state. *See, e.g., HK China Grp., Inc.*, 417 F. App’x at 666 (attendance at a few meetings in California did not constitute purposeful availment); *Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990) (“three trips to California were discrete events arising out of a case centered entirely in Florida”). Nor can two tweets, one publicly acknowledging a discussion with West Coast restaurants, and the other congratulating a California restaurant for ending regressive tipping practices, support specific jurisdiction. Kind words, encouragement, and social justice advocacy via Twitter are not intentional acts aimed at a particular state. *See Headspace Int’l, LLC*, 2016 WL 9275781, at *4 (“[s]ubjecting someone to

personal jurisdiction in California for merely having contact with Californians on social media would subject millions of people to personal jurisdiction in California”).

Next, the Opposition contends in a footnote, and without any legal analysis, that Paragraph 48 of the FAC allows this Court to exercise *general* jurisdiction over Mr. Meyer, “based on what appears to be substantial, systematic, and continuous contacts in California from his opening or supporting through investment and hands-on assistance . . . of multiple restaurants and retail food outlets in this state.” (Opp. at 15–16, n. 6 (citing FAC ¶ 48).) This is a legal conclusion, not a factual pleading. Plaintiff completely ignores the law set forth in Section III(4) of the Motion that passive investments in different restaurants that are not part of the alleged conspiracy are legally irrelevant. (See Motion at 12–13.) Those passive minority investments in Shake Shack, Salt & Straw, and Tender Greens are not the “continuous and systematic” affiliations that render him “essentially at home” in California—which is what Plaintiff needs to establish general personal jurisdiction over Mr. Meyer. See *Daimler AG*, 571 U.S. at 749–50; see also *Yolo Med., Inc. v. Lila Enter., LLC*, No. CV 14-06537-AB (RZx), 2014 WL 12558314, at *2 (C.D. Cal. Nov. 21, 2014) (quoting *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952)).⁴

The Marlow Defendants. Plaintiff argues that the Marlow Defendants may be subject to specific jurisdiction, because Mr. Tarlow assisted in creating a gratuity-free logo, which could be downloaded from a website available to the public. (Opp. at 16.) Plaintiff contends this act “was expressly aimed at restaurants beyond the local New York market, including those in California.” (*Id.*) But the FAC provides no facts in support of this assertion, other than Plaintiff’s conclusory speculation. Plaintiff does not, and cannot in good faith, allege that Mr. Tarlow himself or anyone on his or Marlow, Inc.’s behalf ever solicited a single California restaurant or made any agreement with one concerning *free* use of the logo. Creating a logo,

⁴ As a matter of law, even a wholly-owned subsidiary in California would not suffice. See *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) (“The existence of a parent-subsidary relationship is insufficient, on its own, to justify imputing one entity’s contacts with a forum state to another for the purpose of establishing personal jurisdiction.”) (internal quotations and citations omitted).

1 which is publicly available for free, cannot constitute an act that is purposefully directed toward
 2 a particular state. *See NuboNau, Inc. v. NB Labs, Ltd*, No. 10CV2631-LAB BGS, 2012 WL
 3 843503, at *6 (S.D. Cal. Mar. 9, 2012) (“promot[ing] one’s business” via the Internet does not
 4 constitutes “purposeful direction at California”).

5 Moreover, it is telling that plaintiff declines to identify a single restaurant in California
 6 that has made use of the logo. Indeed, costly and unwarranted jurisdictional discovery would
 7 only show that not one of the California defendants has made use of the logo. Whatever
 8 plaintiff’s purported claims are based on, they are certainly *not* related to any of the Marlow
 9 defendants’ activities in California. In short, none of the Marlow defendants’ alleged acts can
 10 fairly be said to have been expressly aimed at California, a market in which Marlow, Inc. does
 11 not even compete. *Burger King Corp.*, 471 U.S. at 476-477 (defendant’s contacts with the forum
 12 state must not only be sufficient, but such that the maintenance of the action will not “offend
 13 traditional notions of fair play and substantial justice.”)

14 **The NYHA Defendants and the Molinero Defendants.** Plaintiff now admits—two
 15 complaints later—that with respect to Defendants Adler, Miller, and Molinero, he “cannot show
 16 a supporting act aimed at California from these three defendants to satisfy the specific
 17 jurisdictional requirement.” (Opp. at 19.) Similarly, as for Defendants Rigie and NYHA,
 18 Plaintiff concedes that he “cannot show a supporting act aimed at California from these two
 19 defendants to satisfy the specific jurisdictional requirement.” (*Id.*) The Court should accept this
 20 concession and dismiss these defendants from this lawsuit, none of whom should ever have been
 21 subject to the expense of twice briefing motions to dismiss complaints that Plaintiff concedes he
 22 never had a basis to file. Additionally, for the reasons explained in Section III(C) below, the
 23 Court should deny Plaintiff’s request for jurisdictional discovery from these defendants.

24 **B. Plaintiff’s Discredited “Conspiracy Jurisdiction” Theory Cannot Provide an**
 25 **“Alternative Road” to Personal Jurisdiction.**

26 Recognizing that he cannot satisfy the constitutional standard, Plaintiff instead urges “a
 27 more lenient theory” of personal jurisdiction based on “an alleged conspiracy.” (Opp. at 9.)
 28 That “alternative road” is a dead end.

1 **First**, “conspiracy jurisdiction” has been routinely rejected by the Ninth Circuit and other
 2 California courts, which Plaintiff concedes. (Opp. at i, 9.) Plaintiff errs, however, in suggesting
 3 that conspiracy jurisdiction still remains a potentially viable theory. In *Chirila*, the Ninth Circuit
 4 explained that “[t]here is a great deal of doubt surrounding the legitimacy of this conspiracy
 5 theory of personal jurisdiction,” several California district courts and legal commentators had
 6 rejected the theory, and the Ninth Circuit had previously “rejected an analogous theory.” 47 Fed.
 7 Appx. at 842–43 (citing *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 492 (9th
 8 Cir. 1979) (rejecting a conspiracy theory of venue)). The Ninth Circuit also noted that
 9 conspiracy jurisdiction had previously been rejected in *Underwager v. Channel 9 Australia*, 69
 10 F.3d 361, 364 (9th Cir. 1995). *Id.* The notion that the Ninth Circuit may reverse course and
 11 decide to embrace the conspiracy theory is particularly unfounded in light of the Supreme
 12 Court’s many recent efforts to rein in jurisdictional theories that fail to consider the defendant’s
 13 “own contacts” with the forum state. *Walden*, 134 S. Ct. at 1124.⁵

14 Indeed, just last year, Plaintiff’s theory was rejected in another antitrust lawsuit, *In re*
 15 *Dental Supplies Antitrust Litig.*, 2017 WL 4217115. The court refused to exercise specific
 16 personal jurisdiction where, as here, a non-resident plaintiff sued non-resident defendants under
 17 the nebulous “conspiracy jurisdiction” banner. *Id.* at *7–9. Nowhere does Plaintiff address, or
 18 even attempt to distinguish, *In re Dental Supplies*. (See Motion at 14.)

19 **Second**, Plaintiff’s argument that “multiple federal and state courts have adopted a more
 20 lenient theory of establishing personal jurisdiction with respect to an alleged conspiracy” rests on
 21 a single, outdated, and out-of-circuit case that has since been overruled. (Opp. at 9.) Nearly

22 ⁵ Like the Ninth Circuit, this District has repeatedly refused to recognize a “conspiracy
 23 theory.” In *In re Dynamic Random Access Memory (Dram) Antitrust Litig.*, No. C 02-1486 PJH,
 24 2005 WL 2988715, at *8 (N.D. Cal. Nov. 7, 2005), the court acknowledged that “[t]he
 25 conspiracy theory doctrine is not a generally accepted theory” and “decline[d] plaintiffs’
 26 invitation to adopt the conspiracy theory of personal jurisdiction.” *Id.* at *8; *see also U.S.*
 27 *Vestor*, 290 F. Supp. 2d at 1065 (“California law does not recognize conspiracy as a basis for
 28 acquiring jurisdiction over a foreign defendant”); *Kipperman*, 422 F. Supp. at 873 n.14 (rejecting
 as “frivolous” the “contention that personal jurisdiction, the exercise of which is governed by
 strict constitutional standards, may depend on upon the imputed conduct of a co-conspirator” and
 determining that “personal jurisdiction over any non-resident individual must be premised upon
forum-related acts personally committed by the individual”) (emphasis added).

twenty years ago, in *In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26 (D.D.C. 2000), a district court in the District of Columbia applied Illinois law and determined that “plaintiffs’ allegations as they now stand are insufficient to establish conspiracy jurisdiction over these alien corporations.” *Id.* at 33 (citing *Green v. Advance Ross Elecs. Corp.*, 86 Ill. 2d 431 (1981)).⁶

Plaintiff contends that in *In re Vitamins*, the court found “*Calder* ‘effects-test’ jurisdiction in California and Illinois.” (Opp. at 9.) Nowhere in the opinion, however, does the *In re Vitamins* court discuss *Calder*, the effects test, or any California contacts at all. *See In re Vitamins Antitrust Litig.*, 94 F. Supp. 2d 26. Plaintiff further argues that under *In re Vitamins* and *Textor v. Bd. of Regents of N. Illinois Univ.*, 711 F.2d 1387 (7th Cir. 1983), “jurisdiction established over one co-conspirator is jurisdiction over all co-conspirators” (Opp. at 9), even though that proposition finds no support in either case.⁷ Indeed, Plaintiff’s exact argument was rejected by the Illinois Supreme Court in the very opinion relied upon by the *In re Vitamins* court. *See Green*, 86 Ill. 2d at 44 (“***It is not true that if one conspirator is subject to Illinois jurisdiction so are all the others.***”) (emphasis added).

Worse still, the only case upon which Plaintiff relies, *In re Vitamins*, and more generally, the very notion of “conspiracy jurisdiction,” has since been expressly disavowed by both the Illinois Supreme Court and the Seventh Circuit. *See Ploense v. Electrolux Home Products, Inc.*, 377 Ill. App. 3d 1091, 1105 (2007) (explaining that after *Green*, the Illinois Supreme Court “effectively scutt[ed]” the theory of conspiracy jurisdiction); *see also Smith v. Jefferson County*

⁶ The *In re Vitamins* court relied on an opinion of the Illinois Supreme Court, *Green v. Advance Ross Elecs. Corp.*, 86 Ill. 2d 431 (1981), in which the Illinois Supreme Court rejected the application of a “conspiracy theory” of personal jurisdiction and determined that “[t]he idea of jurisdiction based on the acts of co-conspirators has been questioned . . . But even if long-arm jurisdiction over conspirators may be established in some cases, it has no application to this case.” *Id.* at 440–41.

⁷ In *Textor v. Bd. of Regents of N. Illinois Univ.*, 711 F.2d 1387 (7th Cir. 1983), the Seventh Circuit agreed that the complaint at issue failed to allege an actionable conspiracy, and therefore conspiracy jurisdiction was unavailable. *Id.* at 1393. At best, the Seventh Circuit stated that it might be possible for a plaintiff to successfully plead facts “supporting application of the conspiracy theory of jurisdiction” by alleging “both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state.” *Id.* at 1392–93.

1 *Bd. of Educ.*, 378 Fed. Appx. 582, 585–86 (7th Cir. 2010) (acknowledging that conspiracy
2 jurisdiction “may not be valid in Illinois” and as a legal theory was only “marginal at best”).

3 ***Third***, even if the conspiracy theory *could be* applicable, Plaintiff’s attempt to invoke it
4 would fail because Plaintiff has failed to plead the existence of a conspiracy. In the Opposition,
5 Plaintiff refers to specific paragraphs in the FAC, which he contends provide the “facts reflecting
6 concerted action among the defendants to form the conspiracy, and to carry it out.” (Opp. at 1.)
7 For the reasons explained in Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6), Dkt. 144,
8 at 14–19, and the concurrently-filed reply in support, those allegations fail to establish the
9 existence of an unlawful conspiracy. *See also Uhr*, 2011 WL 4091866 at *10 (rejecting theory
10 that “bar owners in one state” would form a conspiracy and “agree to fix prices with bar owners
11 in another state” because “[a]fter all, they operate in totally different markets”).

12 ***Finally***, Plaintiff recognizes that a New York court has personal jurisdiction over the
13 New York Defendants. (Opp. at 15.) However, Plaintiff contends that suing the New Yorkers in
14 New York would be inconvenient or inefficient, *i.e.*, “re-directing the case to New York would
15 create the flip side of the distant court problem presented by bringing a bi-coastal conspiracy
16 complaint in California,” because Plaintiff predicts the California defendants would challenge a
17 New York court’s exercise of jurisdiction over them. (*Id.*) In other words, Plaintiff argues that
18 the Court should defer to a Minnesota resident’s decision to file a case in California against
19 various defendants based in New York and California. (*Id.*) Plaintiff’s argument is contrary to
20 the Fourteenth Amendment, and decades of Supreme Court jurisdiction, which reaffirm
21 Plaintiff’s obligation to plead a factual basis for *each* claim alleged against *each* defendant. The
22 New York Defendants’ constitutional rights cannot be overridden by Plaintiff’s preference to
23 proceed in the court of his choosing. *See Bristol-Myers*, 137 S. Ct. at 1779 (the Court’s
24 jurisdictional analysis focuses on the defendants—not on plaintiffs, public policy, or case
25 management efficiency).

26 **C. Plaintiff Is Not Entitled to Jurisdictional Discovery.**

27 The central theme of the Opposition is that Plaintiff now would like a chance to take
28 “jurisdictional discovery to secure th[e] facts” that, as a matter of law and professional practice,

1 should have been marshalled *before* filing two complaints. (*See* Opp. at 9; *see also id* at 1, 4, 5,
 2 9–13, 16–24.) Nowhere, however, has Plaintiff shown *why* he deserves it (hunches and hopes do
 3 not suffice), *what* “discovery” he seeks (he proffers no plan), and *why* he has confidence that it
 4 will make a difference (as opposed to it “plausibly” may make a difference). If anything, the
 5 Opposition undermines the requested discovery because it finally concedes that Plaintiff does not
 6 have a single fact to connect five New York Defendants to California, and as for the others, falls
 7 back on a “lenient” conspiracy pleading standard (which has never been accepted, *see supra*),
 8 statements made via Twitter, which can be viewed by anyone, and industry conferences held in
 9 California, along with and Texas and Colorado.⁸

10 The Court, of course, has broad discretion when it comes to jurisdictional discovery.
 11 *Lang v. Morris*, 823 F. Supp. 2d 966, 979 (N.D. Cal. 2011). “Jurisdictional discovery need not
 12 be allowed, however, if the request amounts merely to a “fishing expedition.” *Barantsevich v.*
 13 *VTB Bank*, 954 F. Supp. 2d 972, 996 (C.D. Cal. 2013) (citation omitted). Requests for
 14 jurisdictional discovery are appropriately denied if the request is “based on little more than a
 15 hunch that it might yield jurisdictionally relevant facts,” *Boschetto v. Hansing*, 539 F.3d 1011,
 16 1020 (9th Cir. 2008), or “when it is clear that further discovery would not demonstrate facts
 17 sufficient to constitute a basis for jurisdiction,” *Wells Fargo & Co. v. Wells Fargo Express Co.*,
 18 556 F.2d 406, 430 n.24 (9th Cir. 1977). The Court should not allow discovery here.

19 **First**, Plaintiff falls short of his initial burden to plead sufficient facts to establish a
 20 “colorable basis” for personal jurisdiction *before* discovery is ordered.” *Phillips*, 2012 WL
 21 5185848, at *7 (emphasis added). Plaintiff ignores his burden to establish a “colorable basis”
 22 before any discovery can be ordered, and instead urges the Court to apply a “more lenient”
 23 threshold for jurisdictional discovery, again based on his “conspiracy theory.” (Opp. at 10.)
 24 That argument is not even supported by the two out-of-circuit cases that Plaintiff cites. Rather,
 25 in *Youming Jin v. Ministry of State Sec.*, 335 F. Supp. 2d 72 (D.D.C. 2004), the District Court for
 26

27 ⁸ Plaintiff also does not say why, if he so acutely needs discovery to find jurisdiction, he
 28 did not ask for any of it until *after* putting Defendants to the expense of filing motions to dismiss
two complaints (the one he abandoned, and now the FAC).

1 the District of Columbia granted jurisdictional discovery with respect to one (of many)
 2 defendants where, unlike here, the plaintiff successfully pleaded every prong of conspiracy
 3 claim, and alleged in disturbing detail the politically-motivated violence and oppression that
 4 included specific acts against plaintiff, on a variety of dates, within the District of Columbia. *Id.*
 5 at 83–84.

6 Plaintiff cannot credibly rely on *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415
 7 (D.C. Cir. 1991), plainly inapplicable civil rights litigation where jurisdictional discovery was
 8 appropriate because, unlike here: (i) plaintiff’s pleading of the conspiracy was “far from
 9 conclusory,” *id.* at 425; (ii) defendants directed the misconduct into the forum when they
 10 “effectually kidnapped [plaintiffs] from the State Maryland into the District of Columbia” *id.* at
 11 431, and (iii) jurisdictional discovery was necessary to resolve factual disputes about defendants’
 12 connection to the misconduct in the forum that arose from conflicting affidavits adduced by both
 13 plaintiffs and defendants, *id.* at 42.⁹ Plaintiff comes no closer with *Andes Indus., Inc. v. Chen*
 14 *Sun Lan*, 2:14-CV-00400-APG-GWF, 2014 WL 6611227 (D. Nev. Nov. 19, 2014), where the
 15 court denied jurisdictional discovery as to the only defendant that had actually been served. *Id.*
 16 at *9.

17 There is no “colorable basis” in the FAC for jurisdictional discovery. As for *five* of the
 18 New York Defendants (Messrs. Rigie, Adler, Miller, Molinero LLC, and NYHA), Plaintiff
 19 concedes that he has failed to allege **any** basis for specific jurisdiction. (Opp. at 19.) This
 20 concession mandates the denial of Plaintiff’s request, because he has not met his burden to
 21 establish a “colorable basis” for jurisdiction over these defendants.

22 Plaintiff contends, however, that he should be allowed to take jurisdictional discovery to
 23 explore these defendants’ contacts with California. (Opp. at 19–20.) The only allegation that
 24 Plaintiff offers in support of his request for jurisdictional discovery is that NYHA sponsored an
 25

26 ⁹ The *Edmond* court contrasted the plaintiff’s specific and sufficient allegations in that case
 27 with those at issue in *Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983), which
 28 affirmed the denial of jurisdictional discovery where, just like here, plaintiff sued multiple
 nonresident defendants for an alleged conspiracy with “pleadings [that] contained no allegations
 of specific facts that could establish the requisite contacts with the District.” *Id.* at 788.

1 “industry conference” at an unidentified location (but likely in New York), where Rigie
 2 discussed some of the challenges faced by restaurants seeking to move to a Hospitality Included
 3 model. (Opp. at 19 (citing FAC ¶ 75).) Plaintiff also contends that Mr. Adler was a “leader” of
 4 the no-tipping “movement,” and that jurisdictional discovery *may* “reveal his broad-based
 5 ‘movement’ efforts directed toward California.” (*Id.* at 18.) Promoting a particular practice in
 6 New York that might be of interest to the hundreds of thousands of sit-down restaurants across
 7 the United States (not to mention the rest of the world) cannot constitute an act directed towards
 8 one particular state. These allegations do not establish a “colorable basis” to find that these
 9 defendants have the necessary contacts *with California* to subject them to personal jurisdiction
 10 in this state.

11 As to other Defendants, such as Mr. Meyer, Plaintiff falls back on passive-voice
 12 speculation that “there is reason to believe that Meyer has substantial contacts in California
 13 beyond what is alleged in [paragraph 48] of the FAC.” (Opp. at 16, n.6.) Plaintiff’s request for
 14 jurisdictional discovery, based on Plaintiff’s “purely speculative allegations of attenuated
 15 jurisdictional contacts” must be denied. *Videx, Inc. v. Micro Enhanced Tech., Inc.*, 6:12-CV-
 16 0065-AA, 2012 WL 1597380, at *2 (D. Or. May 4, 2012); *see also Butcher’s Union Local No.*
 17 *498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986)
 18 (affirming district court’s denial of jurisdictional discovery request where the plaintiffs “state
 19 only that they ‘believe’ that discovery will enable them to demonstrate sufficient California
 20 business contacts to establish the court’s personal jurisdiction”).

21 ***Second***, the facts alleged in the FAC do not suggest that jurisdictional discovery will
 22 reveal evidence of how these non-resident defendants purposefully directed activities toward
 23 California. The FAC does not indicate how or why the New York Defendants, who eliminated
 24 tipping at their own restaurants *in New York*, purposefully directed their activities *toward*
 25 *California*. *See, e.g., Mavrix Photo, Inc. v. Moguldom Media Grp. LLC*, No. CV 10-9351
 26 RSWL (JCGx), 2011 WL 1134187, at *3 (C.D. Cal. Mar. 28, 2011) (“Plaintiff’s allegations that
 27 Defendant directed its activities at this forum are conclusory and do not support a finding that
 28 further discovery will likely provide sufficient evidence to the contrary.”); *Gemcap Lending I*,

1 *LLC v. Grow Michigan, LLC*, 2:17-CV-07092-ODW (AS), 2018 WL 654409, at *5 (C.D. Cal.
 2 Jan. 31, 2018) (denying jurisdictional discovery where Plaintiff “provide[d] no plausible theory
 3 of how Defendants purposefully directed their activities to California” and therefore “present[ed]
 4 no facts that would allow the Court to find discovery permissible”); *Camp W. Records Inc. v.*
 5 *Gibbs*, (MRWx), 2013 WL 12191723, at *10 (C.D. Cal. Oct. 28, 2013) (denying jurisdictional
 6 discovery where such discovery was “likely to result in little evidence” of an Australian entity’s
 7 “purposeful direction of acts in this district”).

8 **Third**, the Opposition repeatedly insists that Plaintiff needs jurisdictional discovery (Opp.
 9 at 1, 4, 5, 9–13, 16–24), but makes no effort to explain what he seeks. Plaintiff has not provided
 10 this Court with the discovery he would like to propound, nor does he identify the specific
 11 California contacts that would be revealed by any such discovery. This deficiency also mandates
 12 dismissal. *See The Carsey-Werner Co., LLC v. British Broad. Corp., et al.*, No. CV 17-8041 PA
 13 (ASx), 2018 WL 1083550, at *8 (C.D. Cal. Feb. 23, 2018) (“Plaintiff does not explain what
 14 discovery it would conduct or why it would be helpful.”); *Mehr v. Fédération Internationale de*
 15 *Football Ass’n*, 115 F. Supp. 3d 1035, 1054 (N.D. Cal. 2015) (rejecting jurisdictional discovery
 16 where plaintiff “provided no indication as to [how] discovery might possibly demonstrate facts
 17 sufficient to constitute a basis for jurisdiction”); *Liberty Media Holding, LLC v. Tabora*, No. 11-
 18 CV-651-IEG (JMA), 2012 WL 28788, at *7 (S.D. Cal. Jan. 4, 2012) (“Plaintiff provides no
 19 explanation in its motion of what discovery it seeks to conduct and what facts it expects to
 20 uncover if it is granted leave to conduct discovery.”).

21 **IV. CONCLUSION**

22 Plaintiff failed to plead sufficient facts for this Court to exercise jurisdiction over the
 23 New York Defendants, and failed to justify his request for jurisdictional discovery. The Court
 24 should dismiss the FAC without leave to amend.
 25
 26
 27
 28

1 Dated: April 23, 2018

Respectfully submitted,

2
3 By: /s/ Stuart C. Plunkett

Jonathan A. Shapiro (Cal. Bar No. 257199)

jonathan.shapiro@bakerbotts.com

4 Stuart C. Plunkett (Cal. Bar No. 187971)

stuart.plunkett@bakerbotts.com

5 Ariel D. House (Cal. Bar No. 280477)

ariel.house@bakerbotts.com

6 Baker Botts LLP

101 California Street, Suite 3600

7 San Francisco, California 94111

Telephone: (415) 291-6200

8 Facsimile: (415) 291-6300

9 *Counsel for Defendants*

10 *Union Square Hospitality Group, LLC,*

Daniel Meyer, and Sabato Sagaria

11
12 By: /s/ Todd Norris

C. Todd Norris (Cal. Bar No. 181337)

todd.norris@bullivant.com

13 Bullivant Houser Bailey PC

101 Montgomery St. Suite 2600

14 San Francisco, CA 94104

15 Phone: (415) 352-2720

16 *Counsel for Defendants*

Marlow, Inc.; Andrew Tarlow; Molinero LLC, dba

17 *Huertas; Jonah Miller; Nate Adler*

18 By: /s/ Stephen H. Sutro

Stephen H. Sutro (Cal. Bar No. 172168)

shsutro@duanemorris.com

19 Duane Morris LLP

20 One Market, Spear Tower, Suite 2200

San Francisco, CA 94105

21 Telephone: (415) 957-3008

22 *Counsel for Defendants*

23 *New York City Hospitality Alliance, Inc. and*

24 *Andrew Rigie*

ATTORNEY ATTESTATION

I, Stuart C. Plunkett, hereby attest, pursuant to Civil Local Rule 5-1(i)(3) of the Northern District of California, that the concurrence to the filing of this document has been obtained from each signatory hereto.

/s/ Stuart C. Plunkett

Stuart C. Plunkett

*Counsel for Defendants
Union Square Hospitality Group, LLC,
Daniel Meyer, and Sabato Sagaria*

CERTIFICATE OF SERVICE

I, Stuart C. Plunkett, hereby certify that on April 23, 2018, I electronically filed the above document with the U.S. District Court for the Northern District of California by using the CM/ECF system. All participants in the case are registered CM/ECF users who will be served by the CM/ECF system.

/s/ Stuart C. Plunkett

Stuart C. Plunkett

*Counsel for Defendants
Union Square Hospitality Group, LLC,
Daniel Meyer, and Sabato Sagaria*

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/s/ Stuart C. Plunkett

Stuart C. Plunkett

*Counsel for Defendants
Union Square Hospitality Group, LLC,
Daniel Meyer, and Sabato Sagaria*